BEFORE THE HEARING OFFICER
OF THE TAXATION AND REVENUE DEPARTMENT
OF THE STATE OF NEW MEXICO

IN THE MATTER OF THE PROTEST OF
RAC TRANSPORT CO. INC **No. 14-2**
TO ASSESSMENTS ISSUED UNDER LETTER
ID NO. L1631505728

DECISION AND ORDER

A protest hearing occurred on the above captioned matter on October 15, 2013 before Brian VanDenzen, Esq., Tax Hearing Officer, in Santa Fe. Attorney Lori Krehbiel appeared representing RAC Transport Co. Inc. ("Taxpayer"). Mr. Howard Perea appeared as a Taxpayer witness. Staff Attorney Susanne Roubidoux appeared representing the State of New Mexico Taxation and Revenue Department ("Department"). Protest Auditor Lizzy Vedamanikam appeared as a witness for the Department. Department Exhibits A and C were admitted into the record. All exhibits are more thoroughly described in the Administrative Exhibit Log. At the request of the hearing officer, on October 16, 2013 the Department submitted without objection an updated list of Taxpayer's outstanding tax liabilities. Also at the hearing officer's request, parties submitted briefings on Taxpayer's argument of a commerce clause violation in this matter. Taxpayer submitted its brief on November 7, 2013, while the Department submitted its reply brief on November 25, 2013, when the matter became ripe for a decision. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. On December 27, 2012, the Department assessed Taxpayer $228,759.74 in Weight Distance Tax, $45,751.95 in penalty, $42,025.64 in interest, and $14,000.00 in Weight

Distance Tax underreporting penalty for a total assessment of $330,537.33 for the reporting period beginning March 31, 2006 through June 30, 2011. **[Letter id. no. L1631505728]**.

2. On January 25, 2013, Taxpayer requested an extension of time to file a protest.

3. On January 30, 2013, the Department granted Taxpayer a retroactive extension in which to file a protest.

4. On March 13, 2013, Taxpayer protested the assessment.

5. On March 26, 2013, the Department acknowledged receipt of Taxpayer's protest.

6. On August 2, 2013, the Department requested a hearing in the matter.

7. On August 6, 2013, the Hearings Bureau issued Notice of Administrative Hearing, scheduling this matter for October 15, 2013 at 1:00 p.m.

8. After the hearing, on November 7, 2013, Taxpayer filed its "Supplemental Briefing on Violation of the Commerce Clause." On November 25, 2013, the Department filed its Response to Taxpayer's supplemental briefing, making this record ripe for a decision beginning on that date.

9. Taxpayer is a family owned business. Howard Perea is partial owner and the vice president of Taxpayer. Mr. Perea runs Taxpayer's operations, and has done so for the past eight years. **[10-15-13 CD 26:02-38]**.

10. Taxpayer is a LTL—less than a truck load—freight shipping company. It consolidates smaller than truck sized shipments from various customers into one complete trailer, and then delivers those shipments. **[10-15-13 CD 26:38-57]**.

11. Taxpayer operates in Colorado, New Mexico, and Texas. Taxpayer's home office is located in Commerce City, Colorado. Taxpayer has 19-offices across those three states, including eight locations in New Mexico. **[10-15-13 CD 26:57-27:12; Department Ex. A4]**.

12. Taxpayer's business started as a one-way haul freight company. It would deliver a full trailer to a destination, then return with a trailer empty of all load. **[10-15-13 CD 27:30-29:10]**.

13. Taxpayer is registered as a one-way hauler in New Mexico. **[10-15-13 CD 28:50-29:10]**.

14. On July 21, 2011, the Department selected Taxpayer for Weight Distance Tax audit in 2009, 2010, and 2011. **[Department Ex. A4]**.

15. There is no dispute that Taxpayer reported all traveled mileage during the audit period. The problem discovered at audit focuses on whether Taxpayer's mileage by vehicle weight was properly reported and whether Taxpayer qualified for the one-way haul rate during the audit period. **[Department Ex. A5-6; 10-15-13 CD 44:50-46:42, 1:09:21-38]**.

16. Taxpayer's one-way haul business has evolved and grown significantly since its beginning, with its goal to have full loads in both directions. During the audit period Taxpayer acknowledged that it was no longer able to prove that 45% of its miles traveled were empty of all load. **[10-15-13 CD 28:40-29:45, 36:30-37:18]**.

17. The Department concluded during the audit that Taxpayer underreported its tax liability by more than 25% because it could not show that 45% of its miles were empty of all load. Consequently, the audit was expanded to include 2006, 2007, and 2008. **[Department Ex. A6]**.

18. While Taxpayer did have accurate mileage count for each year, Taxpayer was unable to compile records of what portion of its traveled miles in 2006, 2007, and 2008 were empty of all load and what miles were traveled in those years by specific vehicle weight class. **[Department Ex. A6; 10-15-13 CD 39:15-40:05, 48:55-49:38]**.

19. Because Taxpayer did not provide adequate records of miles traveled per vehicle weight class for tax years 2006, 2007, and 2008, the Department employed a sampling methodology of miles traveled by vehicle weight class in those years. This method relied on Taxpayer's reported total traveled mileage in those years as the sampling baseline, and then applied the mileage by weight class percentage obtained from the nearly three full years of Taxpayer's records for 2009, 2010, and 2011. **[10-15-13 CD 1:09:52-1:11:59; Department Ex. A]**.

20. In tax years 2009, 2010, and 2011, Taxpayer underreported vehicle weight class mileage. **[Department Ex. A16; Department Ex. A17; Department Ex. A19; 10-15-13 CD 1:17:30-1:18:05]**.

21. The Department imposed a Weight Distance Tax Penalty only on Taxpayer's underreported vehicle weight class mileage, not on Taxpayer's claim for the one-way haul rate. **[10-15-13 CD 1:14:25-55]**.

22. Because Taxpayer underreported the mileage traveled per vehicle weight class and because Taxpayer claimed the 1/3 reduced one-way haul rate without sufficient records to support that claim, Taxpayer's 2006, 2007, and 2008 tax liability was underreported by 25%. Accordingly, the Department issued the above assessment for Weight Distance Tax reportings periods 2006 through 2011. **[Department Ex. A6; 10-15-13 CD 1:15:00-1:16:29, 1:18:12-1:20:48]**.

23. Between 2006 through 2011, Taxpayer did not research the New Mexico Weight Distance Tax Act or consult with an attorney or certified public accountant about the New Mexico Weight Distance Tax Act. **[10-15-13 CD 42:00-42:30]**.

24. Protest Audit Manager Lizzy Vedamanikam previously supervised the audits of the Weight Distance Tax Unit. In her experience in that capacity, Ms. Vedamanikam is familiar with the Weight Distance Tax audit selection process. In-state and out-of-state corporations are both subject to Weight Distance Tax audits. Location of the company is not an audit selection factor. **[10-15-13 CD 44:00-44:23, 51:55-54:58, 1:07:09-19]**.

25. Taxpayer made numerous payments of tax since the time of assessment totaling $154,032.00. As of the date of hearing, Taxpayer still owed $74,727.74 in assessed Weight Distance Tax, $45, 751.95 in civil penalty, $14,000 in underreporting penalty, and $45,293.06 in interest for a total outstanding liability of $179,772.75. **[Department's October 16, 2013 Statement of Account]**.

DISCUSSION

The Department audited Taxpayer for Weight Distance Tax in years 2009, 2010, and 2011. Although Taxpayer had accurately provided a total traveled mileage during that time, Taxpayer did not have sufficient records to prove that it traveled 45% of those miles empty of all load, as required to claim the one-way hauler rate. Taxpayer also miscategorized some miles traveled into an incorrect, lower vehicle weight classes, resulting in a lower tax rate than required. Because of these two errors, Taxpayer underreported its tax liability by 25% and the Department expanded the audit to include 2006, 2007, and 2008. The Department issued Taxpayer an assessment for Weight Distance Tax reporting periods 2006 through 2011. Taxpayer timely protested that assessment.

Presumption of Correctness and Burden of Proof.

Under NMSA 1978, Section 7-1-17(C) (2007), the assessment issued in this case is presumed to be correct. Consequently, the Taxpayer has the burden to overcome the assessment

and show it was entitled to the reduced tax rate for one-way haulers under the Weight Distance Tax Act. *See Archuleta v. O'Cheskey*, 1972-NMCA-165, ¶11, 84 N.M. 428. However, once a taxpayer rebuts the presumption of correctness, the burden shifts to the Department to show the correctness of the assessed tax. *See MPC Ltd. v. N.M. Taxation & Revenue Dep't*, 2003 NMCA 21, ¶13, 133 N.M. 217.

Seeking the reduced one-way haul rate under the Weight Distance Tax Act is akin to claiming a deduction of tax that otherwise would be owed. Although not directly on point, case law addressing a taxpayer's burden when claiming a deduction is persuasive in considering whether Taxpayer is entitled to the reduced one-way haul rate. "Where an exemption or deduction from tax is claimed, the statute must be construed strictly in favor of the taxing authority, the right to the exemption or deduction must be clearly and unambiguously expressed in the statute, and the right must be clearly established by the taxpayer." *Wing Pawn Shop v. Taxation and Revenue Department*, 1991-NMCA-024, ¶16, 111 N.M. 735 (internal citation omitted); *See also TPL, Inc. v. N.M. Taxation & Revenue Dep't*, 2003-NMSC-7, ¶9, 133 N.M. 447.

Weight Distance Tax Act and the One-way Haul Rate

The Weight Distance Tax Act imposes a tax on all registered vehicles with a declared weight in excess of 26,000 pounds that travel on state highways. *See* NMSA 1978, § 7-15A-3 (1988).

NMSA 1978, Section 7-15A-6 (2004) sets the tax rates under the Weight Distance Tax Act for all motor vehicles other than buses. Subsection A establishes the base tax rates for all registered vehicles based on the vehicles' declared gross weight and on the mileage traveled on state highways. *See* § 7-15A-6 (A). Under Section 7-15A-6 (A), the tax rate increases as a

vehicle's weight classification increases. However, Section 7-15A-6 (B) establishes a reduced one way haul tax rate:

> All motor vehicles for which the tax is computed under Subsection A of this section shall pay a tax that is two-thirds of the tax computed under Subsection A of this section if:
> (1) the motor vehicle is customarily used for one-way haul;
> (2) forty-five percent or more of the mileage traveled by the motor vehicle for a registration year is mileage that is traveled empty of all load; and
> (3) the registrant, owner or operator of the vehicle attempting to qualify under this subsection has made a sworn application to the department to be classified under this subsection for a registration year and has given whatever information is required by the department to determine the eligibility of the vehicle to be classified under this subsection and the vehicle has been so classified.

If the registrant, owner or operator of the vehicle can satisfy the three one-way haul rate criteria identified under Section 7-15A-6 (B), the Weight Distance Tax is calculated at two-thirds of the base tax rate established under Subsection A (or 33% less than the full tax rate per vehicle weight class).

Numerous Department regulations also address one-way haulers for the purposes of Section 7-15A-6 (B). Regulation 3.12.6.7 NMAC (11/15/01) provides definitions for empty miles, loaded miles, and one-way haulers. Under Regulation 3.12.6.7 (A) NMAC, "empty miles" means the "number of miles traveled on New Mexico roads when the vehicle or vehicle combination is transporting no load whatsoever." While Taxpayer argued that the definition of empty of load was ambiguous, the phrase is straightforward given the plain language of Section 7-15A-6 (B) (2) and Regulation 3.12.6.7 NMAC: the vehicle must be empty of all load.

Regulation 3.12.6.8 NMAC (11/15/01) and Regulation 3.12.6.9 NMAC (11/15/01) respectively establish how a registrant can be qualified or disqualified as a one-way hauler. Taxpayer did initially qualify as a one-way hauler under Regulation .12.6.8 NMAC (11/15/01).

Under Regulation 3.12.6.9 NMAC (11/15/01), the fact that the registrant has previously been qualified for the one-way haul rate, does not entitle the registrant to claim that reduced one-way haul rate in any reporting period where the vehicle did not travel forty-five percent empty of all load.

Taxpayer relied on that initial qualification as a registered one-way hauler under Regulation 3.12.6.8 NMAC (11/15/01) to argue that the remedy under Regulation 3.12.6.9 NMAC (11/15/01) for failing to satisfy the traveled 45% empty of all load standard was to prohibit registration of the vehicle as a one-way hauler in the next year rather than assessment of additional tax for the reporting periods at issue. However, Taxpayer's argument ignores the plain language of Regulation 3.12.6.8 (C) NMAC (11/15/01). Under Regulation 3.12.6.8 (C) NMAC (11/15/01), simply being registered as a one-way hauler for the purposes of that regulation does not obviate Taxpayer from showing that it complied with the traveled 45% empty of all load statutory requirement for the reduced one-way haul rate in any given period. Further, because by NMSA 1978, Section 7-1-17 (A) (2007) the Department is required to assess any outstanding tax liability exceeding $25.00, nothing in Regulation 3.12.6.9 NMAC (11/15/01) can be read to prevent the Department from assessing the full weight distance tax in periods where the registrant/taxpayer did not qualify for the reduced one-way hauler rate.

Regulation 3.12.6.11 NMAC (11/15/01) lists the required records that a one-way hauler must possess. NMSA 1978, § 7-15A-6(B) (3) (2004) mandates that before a taxpayer can qualify for the reduced one-way hauler rate, that taxpayer must provide the Department with "whatever information… required by the [D]epartment to determine the eligibility of the vehicle…" By Regulation 3.12.6.11 NMAC (11/15/01), the Department has articulated which records a taxpayer must provide under the statute for a taxpayer claiming the reduced one-way hauler rate:

> A. Vehicle trip mileage records for each vehicle operated in New Mexico. The mileage records shall reflect the total empty miles and the total loaded miles traveled on New Mexico roads. Accurate trip mileage records indicating empty and loaded miles may include:
>
> (1) accurate map mileage for each trip;
>
> (2) hubometer or odometer readings; or
>
> (3) vehicle-specific log books.
>
> B. Vehicle itineraries including the origin and destination point of each trip, and the routes taken.

Consequently, reading the statutory and regulatory requirements together, any time a taxpayer claims the reduced one-way hauler rate under Section 7-15A-6 (B), that taxpayer should use and maintain the records articulated under Regulation 3.12.6.11 NMAC (11/15/01). This statutory and regulatory one-way hauler record keeping requirement is also consistent with the Tax Administration Act ("TAA"), NMSA 1978, Section 7-1-10 (2007), which requires a taxpayer to maintain certain records for any provision of any statute administered by the Department. When a taxpayer fails to maintain adequate records, the Department is authorized to use alternative methods to determine that taxpayer's tax liability. *See* NMSA 1978, §7-1-11 (D) (2007); *see also* Regulation 3.1.5.8 (B) NMAC (12/29/00).

Taxpayer in this case did not present the records necessary to substantiate its claim for the one-way haul rate under Section 7-15A-6 (B) (3) or Regulation 3.12.6.11 (B) NMAC either during the audit or at the hearing. Mr. Perea acknowledged that part of the reason it decided to not reconstruct the required records was that it was unlikely Taxpayer still qualified for the reduced one-way haul rate. In the absence of these required records, the Department used its authority under Section 7-1-11 (D) and Regulation 3.1.5.8 to employ a sampling method in this audit to determine Taxpayer's liability in 2006, 2007, and 2008. The sampling method for 2006-2008 was reasonably reliable because it started from Taxpayer's accurately reported total mileage in those years and relied on nearly three years of Taxpayer's complete records in 2009,

2010, and 2011 to determine the percentages of traveled mileage by specific vehicle weight class. Using nearly three full years of Taxpayer's actual records in 2009, 2010, and 2011 rather than just an isolated quarterly period or an estimated mileage significantly increased the reliability of the auditor's sampling method. Protest Auditor Vedamanikam referenced specific, concrete examples to illustrate the auditor's alternative methodology in determining Taxpayer's liability in tax years 2006, 2007, and 2008.

Without records produced during the audit establishing that Taxpayer's vehicles traveled 45% empty of all load during the relevant period, the Department properly assessed Taxpayer at the full Weight Distance Tax rate. While Taxpayer's argued that the "empty of all load" standard was ambiguous, Taxpayer did not produce any records establishing that it would have qualified under a broader, alternative definition of "empty of all load" than the one employed by the Department. Section 7-15A-6 established the full Weight Distance Tax rate by vehicle weight, and the Department used those rates as applied to Taxpayer's vehicle weight class to issue its assessment. Without records substantiating either the mileage traveled by specific reported vehicle weight class or that the vehicles traveled 45% empty of all load at hearing, Taxpayer did not overcome the presumption of correctness that attached to the assessment.

25% Underreporting of Tax Liability.

Taxpayer challenged the Department's ability to expand the audit to include tax periods 2006, 2007, and 2008, periods beyond the typical statute of limitations on an assessment. Taxpayer made numerous arguments about how concepts in tort law only allow extension of a statute of limitations when there is evidence of concealment or fraud. Taxpayer also argued that absent a failure to file a return, the filing of a false return, or a willful attempt to avoid taxation, the IRS only allows an assessment within three years, and therefore that standard should apply

here. Since Taxpayer accurately reported its total mileage, and lacked any other intentional culpability, Taxpayer argued that expanding the audit was unnecessary and punitive in nature.

However, this is not a tort case or an IRS case but a protest under the New Mexico TAA. The plain language of the TAA and New Mexico case-law interpreting the TAA controls the analysis of this issue. Under NMSA 1978, Section 7-1-18 (A) (1994), the Department typically only has three-years from the end of the calendar year from which a tax was due to issue an assessment. However, under NMSA 1978, Section 7-1-18 (D) (1994), the Department has six-years from the end of the calendar year in which the tax was due to issue an assessment in instances where a taxpayer underreports their tax liability by 25%.

The New Mexico Supreme Court has held that Section 7-1-18 (D) does not depend on an analysis of a taxpayer's intent and/or culpability, only an objective analysis of the facts and the amount of a taxpayer's underreported liability. *See Taxation & Revenue Dep't v. Bien Mur Indian Mkt. Ctr.*, 1989-NMSC-015, ¶6-7, 108 N.M. 228. Further, in *Bien Mur*, ¶7, the New Mexico Supreme Court rejected the notion that Section 7-1-18 (D) is punitive in nature. The New Mexico Supreme Court's *Bien Mur* decision remains good law and is controlling of Taxpayer's argument regardless of Taxpayer's references to tort case law, the IRS code, or other case law not addressing Section 7-1-18 (D).

A case that Taxpayer cites, *Sonic Indus. v. State*, 2000-NMCA-087, ¶35, 129 N.M. 657, (overturned on other grounds), does indicate that the six-year period for assessment under Section 7-1-18 (D) is analogous to a Statute of Limitations. But, unlike *Sonic Indus.*, there is no dispute in this matter that the Department's assessment of 2006, 2007, and 2008 Weight Distance Tax was made within six-years of the end of the calendar from which the tax was originally due. The end of the calendar year when 2006 Weight Distance Tax would have been due is December

31, 2006. *See* NMSA 1978, § 7-15A-9 (A) (1989). Since the December 27, 2012 assessment occurred within six-years of that date, the assessment satisfied *Sonic Indus.'* analogous to the statute of limitations requirement contained in Section 7-1-18 (D) and the Department was obligated to issue the assessment under the rational expressed in *Bien Mur*, ¶7.

Here, the Department determined that Taxpayer had underreported its tax liability by more than 25%. While Taxpayer established that it accurately reported its total traveled mileage, the focus of Section 7-1-18 (D) is accuracy of the reported tax liability rather than the accuracy of the information Taxpayer provided to the Department. By claiming the reduced one-way haul rate, Taxpayer received a 33% reduction in its weight distance tax in 2006, 2007, and 2008. Taxpayer was unable to prove it was entitled to that 33% reduced one-way haul rate. Consequently, simple math established that Taxpayer underreported its tax liability by the 33% difference between the reduced rate it claimed but did not qualify for and the full one-way haul rate it should have reported. Moreover, because some of Taxpayer's reported mileage was not listed in the correct vehicle weight class, resulting in a lower tax rate than required by Section 7-15A-6, Taxpayer also had additional underreported tax liability.

Under the plain language of Section 7-1-18 (D), the Department had the authority to assess Taxpayer weight distance tax in 2006, 2007, and 2008 because Taxpayer underreported its liability by more than 25% in those years and the assessment was issued within six-years of the end of the calendar year in which the taxes were initially due. *See Bien Mur*, ¶7. Moreover, since the Legislature requires under Section 7-1-17 (A) that the Department assess tax in any instance where a Taxpayer has liability for tax above $25.00, the Department was required to assess 2006, 2007, and 2008 weight distance tax against Taxpayer. *See Bien Mur*, ¶12. The Department's assessment of 2006, 2007, and 2008 weight distance tax was appropriate.

Taxpayer's Commerce Clause Argument.

Taxpayer argued that the combination of the Weight Distance Tax Act and the imposition of an additional three-years of tax beyond the normal statute of limitation under the provisions of Section 7-1-18 (D) violated the Commerce Clause of the United States Constitution. In particular, Taxpayer argued that the definition of a one-way hauler is not uniform across the country, which traps an out-of-state company like Taxpayer, who then upon audit are subject to additional three-years of tax liability under Section 7-1-18 (D). Under relevant case law and the facts of this record, Taxpayer's argument does not persuade.

In *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (U.S. 1977), the United States Supreme Court established a four-part test to determine whether a state's attempts at taxation impermissibly interferes with the Commerce Clause: (1) whether there is a substantial nexus between a taxpayer and the taxing State; (2) whether the tax is fairly apportioned; (3) whether the tax discriminates against interstate commerce; and (4) whether the tax is fairly related to the services provided by the State.

Applying that test to the facts of this case, New Mexico's Weight Distance Tax does not violate the Commerce Clause. There is no dispute in this matter that Taxpayer has a substantial nexus with New Mexico, as Taxpayer has eight New Mexico locations and is focused on providing LTL freight services to customers within and without New Mexico. The tax is fairly apportioned and fairly related to services provided in New Mexico because the Weight Distance Tax only applies to miles traveled within this state by vehicle weight class. *See* NMSA 1978, §7-15A-8 (1988). Further, the plain language of New Mexico's Weight Distance Tax is neutral and does not discriminate against interstate commerce. New Mexico's Weight Distance Tax applies equally to both in-state and out-of-state companies for miles traveled within New Mexico. *See*

Am. Trucking Ass'ns v. Mich. PSC, 545 U.S. 429, 434 (U.S. 2005) (Supreme Court found that a neutral, non-discriminatory tax did not offend the Commerce Clause). As Protest Auditor Vedamanikam credibly testified from her experience as supervisor of the Weight Distance Tax Audit Unit, both in-state and out-of-state companies are subject to Weight Distance Tax audits. Nothing in the plain language of the Weight Distance Tax Act or in the record of this proceeding established that the Weight Distance Tax Act or the Department's interpretation of that act discriminated against out-of-state companies or interstate commerce.

The same analysis affirms that Section 7-1-18 (D) does not violate the commerce clause. Section 7-1-18 (D) would only apply to taxpayers with sufficient nexus with New Mexico to trigger outstanding tax liability, which Taxpayer has in this matter. Section 7-1-18 (D) applies to all tax programs that Department administers, and applies equally to in-state companies and out-of-state companies. As the Department compellingly pointed out in its briefing of this issue, the *Bien Mur* case discussing Section 7-1-18 (D) involved a New Mexico taxpayer, illustrating that Section 7-1-18 (D) is neutral in application. The purpose of Section 7-1-18 (D) is to "extend the time subject to assessment" when any taxpayer significantly underreports their tax liability by at least 25%. *See Bien Mur*, ¶7. Such purpose is appropriately related to the State's legitimate authority to collect taxes.

Taxpayer's Commerce Clause argument seems to partially rely on a belief that an out-of-state company cannot possibly be required to know New Mexico's tax laws, and therefore are disadvantaged vis-à-vis in-state companies. However, even though Taxpayer is headquartered in Colorado, this is not an instance of Taxpayer just barely meeting the substantial nexus requirement. The evidence in this matter clearly established that Taxpayer had a significant and substantial nexus with New Mexico, with eight offices across the State. Taxpayer had

sophisticated enough knowledge of the New Mexico Weight Distance Tax Act to register its vehicles initially for the reduced one-way haul rate. Taxpayer's business grew and expanded to the point where Mr. Perea acknowledged that it likely no longer satisfied the one-way haul, 45% requirement. Taxpayer, having done enough research to inure benefit under the reduced one-way hauler tax rate, certainly was capable of researching the potential consequences of its own business growth. Indeed, New Mexico's self-reporting tax system required Taxpayer to do exactly that. *See Tiffany Construction Co. v. Bureau of Revenue*, 1976-NMCA-127, ¶5, 90 N.M. 16 (imposing a reasonable duty on all persons to ascertain the tax consequences of their actions).

Interest and Penalty.

When a taxpayer fails to make timely payment of taxes due to the state, "interest *shall* be paid to the state on that amount from the first day following the day on which the tax becomes due...until it is paid." NMSA 1978, § 7-1-67 (2007) (italics for emphasis). Under the statute, regardless of the reason for non-payment of the tax, the Department has no discretion in the imposition of interest, as the statutory use of the word "shall" makes the imposition of interest mandatory. *See Marbob Energy Corp. v. N.M. Oil Conservation Comm'n*, 2009-NMSC-013, ¶22, 146 N.M. 24 (use of the word "shall" in a statute indicates provision is mandatory absent clear indication to the contrary). The language of the statute also makes it clear that interest begins to run from the original due date of the tax and continues until the tax principal is paid in full.

Further, under NMSA 1978, Section 7-1-69 (2007), when a taxpayer fails to pay taxes due to the State because of negligence or disregard of rules and regulations, but without intent to evade or defeat a tax, the Department must impose a civil negligence penalty on that taxpayer. As discussed above, Section 7-1-69 use of the word "shall" makes the imposition of penalty mandatory in all instances where a taxpayer's actions or inactions meets the legal definition of

"negligence." *See Marbob*, ¶22. Although certainly unintentional, Taxpayer's error in claiming the reduced one-way haul Weight Distance Tax rate without necessary proof of traveling 45% empty of all load constitutes civil negligence. *See El Centro Villa Nursing Center v. Taxation and Revenue Department*, 1989-NMCA-070, ¶10, 108 N.M. 795 (inadvertent error meets the definition of civil negligence). Taxpayer did not show that it made a mistake of law in good faith and on reasonable grounds under Section 7-1-69 (B) or any of the nonnegligence factors that might allow for abatement of penalty under Regulation 3.1.11.11 NMAC (01/15/01).

Finally, under NMSA 1978, Section 7-15A-16 (2009), in addition to civil negligence penalty, the Department was mandated to impose underreported mileage by vehicle weight class on Taxpayer. *See Marbob*, ¶22. Again, while Taxpayer accurately reported total traveled mileage in all periods, some of that mileage was reported in an incorrect vehicle weight class. Since the Weight Distance Tax rate is determined by vehicle weight class, this errant reporting of mileage by weight class led to Taxpayer's unintentional underreporting of Weight Distance Tax liability, which is subject to the mandatory penalty under Section 7-15A-16. Taxpayer's protest is denied.

CONCLUSIONS OF LAW

A. After properly requesting and receiving an extension of time in which to file a protest under NMSA 1978, Section 7-1-24 (B) (2003), Taxpayer filed a timely, written protest to the assessment. Jurisdiction lies over the parties and the subject matter of this protest.

B. Taxpayer did not present sufficient records to demonstrate that it traveled 45% of its miles empty of all load. Consequently, Taxpayer did not prove it was entitled to the reduced one-way haul Weight Distance Tax rate under Section 7-15A-6 (B) or Regulation 3.12.6.11 NMAC. *See Wing Pawn Shop* ,¶16 (a taxpayer must clearly establish the right to a deduction or an exemption from taxation, which is analogous to the reduced tax rate).

C. By failing to produce sufficient records to support its claimed reduced one-way haul Weight Distance Tax Act rate, Taxpayer did not overcome the presumption of correctness that attached to the Department's assessment. *See Archuleta*, ¶11.

D. Because Taxpayer had inadequate records, under Section 7-1-11 and Regulation 3.1.5.8 (B) NMAC, the Department used an alternative and reasonably reliable sampling method to calculate Taxpayer's tax liability during the audit for tax years 2006, 2007, and 2008.

E. Because Taxpayer did not prove it qualified for the 33% reduced one-way haul Weight Distance Tax rate, Taxpayer underreported it tax liability by at least 25% in each reporting period at issue. Consequently, under Section 7-1-18 (D), the Department was required to assess Taxpayer for 2006, 2007, and 2009 taxes. *See Bien Mur*, ¶6-7.

F. The Weight Distance Tax Act and/or Section 7-1-18 (D) are facially neutral non-discriminatory State taxation statutes that do not violate the Commerce Clause. *See Mich. PSC*, 434; *See also Brady*, 279.

G. Under the mandatory "shall" language of Section 7-1-67, Taxpayer is liable for accrued interest under the assessment. *See Marbob*, ¶22.

H. Under the mandatory "shall" language of Section 7-1-69, Taxpayer is liable for civil negligence penalty. *See Marbob*, ¶22. Although Taxpayer's error was unintentional, such error constitutes civil negligence subject to penalty. *See El Centro Villa Nursing Center*, ¶10.

I. Under the mandatory "shall" language of Section 7-15A-16, Taxpayer is liable for Weight Distance Tax underreporting mileage by weight class civil penalty. *See Marbob*, ¶22

For the foregoing reasons, Taxpayer's protest **IS DENIED.** As of the date of hearing, Taxpayer still owed $74,727.74 in assessed Weight Distance Tax, $45,751.95 in civil penalty,

$14,000 in underreporting penalty, and $45,293.06 in interest for a total outstanding liability of $179,772.75. Interest continues to accrue until tax principal is satisfied.

DATED: January 30, 2014.

Brian VanDenzen, Esq.
Hearing Officer
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